IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

MONDAY, THE 22ND JANUARY 2007 / 2ND MAGHA 1928

OP.No. 20099 of 1999(P)

PETITIONER:

M/S.SHRIRAM ENGINEERING CONSTRUCTION COMPANY LIMITED, REP. BY N.SRINIVASAN,ASSISTANT VICE PRESIDENT, CORPORATE SERVICES,304/305 ANNASALAIGUNA BUILDING, 6TH FLOOR,THYNAMPET, CHENNAI-18. SUBSTITUTED AS M/S.SHRIRAM E.P.C.LIMITED, MOOKAMBIKA COMPLEX, 4TH FLOOR, NO.4, LADY DESIKACHERY ROAD, MYLAPORE, CHENNAI-600 004, REP. BY ITS DIRECTOR (SUBSTITUTED AS PER THE ORDER DATED 24.11.2005 IN I.A.NO.12779/2005)

BY ADV. SRI.SABU GEORGE
SRI.B.KUMAR (SR)

RESPONDENTS:

1.KERALA STATE INDUSTRIAL DEVELOPMENT, CORPORATION LIMITED, REP. BY MANAGING DIRECTOR, KESTON ROAD, KOWDIAR,THIRUVANANTHAPURAM-695 003.

2.THE CHIEF ENGINEER,KERALA STATE INDUSTRIAL DEVELOPMENT CORPORATION LIMITED, KESTON ROAD, KOWDIAR,THIRUVANANTHAPURAM – 695 003.

BY ADV. SRI.M.PATHROSE MATHAI
SRI.SAJI VARGHESE

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 22/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P.20099/1999

ORDER ON C.M.P.NO.33141/1999 IN O.P.20099/1999

DISMISSED.

SD/- J.B.KOSHY, JUDGE

SD/- K.P.BALACHANDRAN, JUDGE

22.1.2007

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE LETTER OF INDENT DATED 21.2.1998.

EXT.P2: COPY OF TENDER DOCUMENTS DATED 18.11.1997.

EXT.P3: COPY OF THE ACKNOWLEDGMENT FOR HANDING OVER SITE TO THE CONTRACTOR DATED 9.3.1998.

EXT.P4: COPY OF THE LETTER FOR DRAWINGS AND DETAILS DATED 20.8.1998.

EXT.P5: COPY OF THE LETTER OF VARIOUS DETAILS DATED 22.12.1998.

EXT.P6: COPY OF THE LETTER DATED 20.11.1998.

EXT.P7: COPY OF THE LETTER DATED 25.11.1998.

EXT.P8: COPY OF THE LETTER RECEIVED FROM THE OFFICER OF THE RESPONDENT DATED 22.12.1998.

EXT.P9: COPY OF THE ORDER NO.KSIDC/IGC/3-24 DATED 13.1.1999.

EXT.P10: COPY OF THE CLAIM IN TERMS OF CLAUSE 31 DATED .03.99.

EXT.P11: COPY OF THE DOCUMENT WHICH IS STYLED AS A REPLY TO PETITIONER CLAIM AND ALSO HIS DECISION AS ALSO THE EXHIBITS CONSISTING OF CORRESPONDENCE CITED BY THE RESPONDENT DATED 5.6.1999.

EXT.P12: COPY OF THE LETTER NO.KSIDC/IGC/3.24/2337 DATED 22.7.1999.

O.P.20099/1999

RESPONDENT'S EXHIBITS:

EXT.R1(A): COPY OF THE LETTER DATED 23.7.1998 SENT BY MODERN PLUMBING SYSTEMS AND SERVICES TO SHRIRAM ENGINEERING.

EXT.R1(B): COPY OF THE LETTER DATED 23.12.1998 SENT BY MODERN PLUMBING SYSTEMS AND SERVICES TO SHRIRAM ENGINEERING.

/TRUE COPY/

J.B.KOSHY & K.P.BALACHANDRAN,JJ.

O.P.No.20099 OF 1999

Dated 22nd January, 2007

JUDGMENT

Koshy,J.

Can revenue recovery proceedings be taken by a Government Company for realising damages arising out of alleged breach of contract especially when damages are not quantified through adjudication is the main question to be decided in this writ petition. Petitioner is a public limited company registered under the Companies Act. First respondent Kerala State Industrial Development Corporation Ltd. (KSIDC) is a State Government undertaking and is a fully owned Government Company. The petitioner was issued with a letter of indent, Ext.P1 dated 21.2.1998, by the first respondent for erection of Water Treatment Plant with rapid and gravity filter pump house and value of the work was estimated at Rs.1,36,20,295/=. Petitioner has deposited Rs.2,00,000/= and the Indent Document was signed by both parties. Ext.P2 is the agreement executed. By Ext.P3 dated 8.3.1998, the site was handed over and the agreement was that project will be completed within fifteen months. According to the petitioner, only on 5.5.1998 drawings were made available by KSIDC and even those drawings were not complete. On 20.8.98, by Ext.P4, final drawings were supplied to the petitioner. Only on 22.12.1998, by Ext.P5, the respondent forwarded details of

Footings to be provided for the stub columns supporting the Filter box, after closing of part of the work. Various correspondence took place between the parties. According to the petitioner, without fulfilling contractual obligations of the respondents, by Ext.P9 dated 13.1.1999, Chief Engineer of first respondent cancelled the contract at the risk and cost of the petitioner. Thereafter, by Ext.P10 dated 10.4.1999 addressed to Managing Director of respondent Corporation, the petitioner made claims for Rs.43 lakhs and requested him for arbitration and settling the issue. The claims were made on six grounds namely:

1. Return of Security deposit Rs.2/- Lakhs with interest at 18%.

2. Idle Labour charges Rs.0ne lakh with interest.

3. Compensation due towards investment at idling machines (hold up of tools & Tackles Rs.5/- lakhs with interest 18%.

4. Compensation for building materials Rs.5/- lakhs with interest at 18% p.a.

5. Damages and delay caused in releasing due payments Rs.5/- lakhs.

6. Consequential damages due to unlawful termination – loss of reputation, loss of business good will Rs.25/- lakhs.

Managing Director rejected the claims by order dated 7.6.1999 (Ext.P11). It is stated in Ext.P11 as follows:

> "Hence the claim petition dated Nil-3-99 of the claimant contractor is totally and summarily rejected outright."

Thereafter, the petitioner filed an Original Petition before this court treating Ext.P11 order of the Managing Director as arbitral award. That was rejected accepting contentions of the respondents that there was no arbitration clause in the agreement and letter of the Managing Director cannot be treated as an arbitral award. Thereafter, the petitioner filed a suit as O.S.No.115 of 2006 before the Sub Court, Thiruvananthapuram claiming damages from the K.S.I.D.C. and the suit is pending.

2. By Ext.P12 dated 22.7.1999 Chief Engineer of the first respondent (second respondent in this O.P.) made a demand of Rs.12,19,769/= as due from the petitioner for re-arranging the work and also threatened that in the event of failure to pay the above sum, Revenue Recovery Act will be invoked for the recovery. Ext.P12 is reproduced as follows:

> "The above work which was awarded on contract to you as per agreement No.IGC/KTP/03 of KSIDC, was terminated as per order second cited. Also, your claims were rejected vide letter third cited.
>
> As already informed and as per conditions of tender and agreement, the loss if any sustained by KSIDC in rearranging the work is to be realised from you.
>
> A statement showing the loss, provisionally assessed, in rearranging

> the work is enclosed herewith for reference. But you are informed that the final figures at the completion of work shall be assessed as cost of completion of the project and any further dues are required from you on this work shall be informed to you and the required amount on such circumstances shall be recovered from you.
>
> I request you to remit an amount of Rs.12,19,769/= (Rupees Twelve lakhs nineteen thousand seven hundred and sixty nine only), within fifteen days on receipt of this letter. If you fail to adhere to this direction, we will be forced to proceed with R.R.Act."

It is the case of the petitioner that the above demand made by the Chief Engineer is wholly illegal and arbitrary. The Chief Engineer is not authorized to make such a demand and threaten the petitioner to recover it under Revenue Recovery Act. When the petitioner's claim was rejected by the Managing Director, petitioner has already approached the civil court and the case is pending in the civil court. It is submitted that without adjudication, the amount of damages even if payable cannot be determined for realising it from him through revenue recovery proceedings. According to the petitioner, Company did not commit any breach, but, breach is on the part of the KSIDC and hence respondent is liable to pay damages.

3. Contention of the respondents is that even though respondent company is a public sector undertaking, claim is arising out of Ext.P2 contract, which is purely a contractual matter and a writ petition under Article 226 of the Constitution of India will not lie. Secondly it was contended that in Ext.P2 contract there is a provision for determination of the amount by the Managing Director of KSIDC. It is also submitted that notification was issued under Section 71 authorising KSIDC to realise the dues by taking steps under the provisions of the Kerala Revenue Recovery Act like Government dues and hence there is no infirmity in the decision. Section 71 of the Kerala Revenue Recovery Act provides as follows:

> "71. Power of Government to declare the Act applicable to any institution.- The Government may, by notification in the Gazette declare, if they are satisfied that it is necessary to do so in public interest, that the provisions of this Act shall be applicable to the recovery of 'amounts due' from any person or class of persons to any specified institution or any class or classes of institutions, and thereupon all the provisions of this Act shall be applicable to such recovery."

In exercise of the powers issued under notification, 'amounts due' to KSIDC also can be realised like dues to the Government by resorting to revenue recovery proceedings under

the Act. But, it gives the right to KSIDC only to recover the 'amount due'. The word 'due' as per Webster's Dictionary means `owing and demanding; payable. According to Black's Law Dictionary, the word 'due' imports a fixed and settled obligation. After considering the decision of the Privy Council in **Hansraj Gupta** v. **Dehra Dun Mussoorie Electric Tramway Co. Ltd.** (AIR 1933 PC 63) interpreting the words 'money due', it was held by the Apex Court in **State of Kerala** v. **Kalliyanikutty** (1999 (2) KLT 146(S.C)) that only the settled and fixed dues can be recovered through the machinery under the Kerala Revenue Recovery Act and it does not create any new right. It only provides a process for speedy recovery of money due – that is settled dues which are either admittedly due or adjudicated and settled. Even time barred dues cannot be recovered. The Three Member Bench of the Apex Court in the above case held as follows:

> "The Kerala Revenue Recovery Act does not create any new right. It merely provides a process for speedy recovery of moneys due. Therefore, instead of filing a suit, (or an application or petition under any special Act), obtaining a decree and executing it, the bank or the financial institution can new recover the claim under the Kerala Revenue Recovery Act. Since this Act does not create any new right, the person claiming recovery cannot claim recovery of amounts which are not legally recoverable nor can a defence of limitation available to a debtor in a suit or other legal proceeding be taken

> away under the provisions of the Kerala Revenue Recovery Act."

Here, the contention of the petitioner is that no amount is due to the KSIDC from the petitioner. In fact, amounts are due from the KSIDC and a bona fide suit is instituted before the civil court for that. Before settling the question whether 'any amount is due' revenue recovery proceedings cannot be taken.

4. In this connection, we also refer to Clause 3 of the preliminary agreement which is as follows:

> "3. If the contractor does not come forward to execute the original agreement after the said work is awarded and selection notice issued in his favour or commits breach of any of the conditions of the contract as stipulated in clause 14 of the Notice inviting Tenders as quoted above within the period stipulated, KSIDC may rearrange the works otherwise or get it done otherwise at the risk and cost of the contractor and the loss so sustained by KSIDC can be realised from the contractor under the Revenue Recovery Act as if arrears of land revenue as assessed, quantified and fixed by an adjudicating authority consisting of KSIDC or any other officer or officers authorised by KSIDC taking into consideration the prevailing rates and after giving due notice to the contractor. The decision taken by such authorised officer or officers shall be final and conclusive and shall be binding on the contractor."

This clause is admittedly not applicable as agreement was executed and there is no breach of any of the conditions of the contract as stipulated in Clause 14 of the Notice inviting tenders. In Clause 31 of Ext.P2 general contract it is stated as follows:

> "31. SETTLEMENT OF DISPUTES
>
> All disputes and difference of any kind whatever arising out of or in connection with the contract or the carrying out of the works (whether during the progress of the work or after their completion and whether before or after the determination, abandonment or breach of the contract) shall be settled by The Managing Director KSIDC who shall state his decision in writing. Such decision may be in the form of a final certificate or otherwise. The decision of the Managing Director KSIDC shall be final and binding on the contractor."

In Clause 34 it is stated as follows:

> "34.JURISDICTION
>
> The Courts at Trivandrum alone shall have jurisdiction in respect of any matter arising out or in connection with this contract."

In Clause 18 of the Notice inviting tenders for work which finally resulted in the contract it is stated as follows:

> "18. Arbitration shall not be a means for settling of disputes. All disputes unless settled by Mutual negotiation, will

> be referred to the Civil courts with jurisdiction at Trivandrum."

5. With regard to the contention that a writ will not lie, it is an accepted proposition of law that generally in contractual matters writ will not be issued merely because one party is a Government undertaking. Apex Court in **Kerala State Electricity Board** v. **Kurien E.Kalathil** ((2000) 6 SCC 293) held as follows:

> "The contract between the parties in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies."

It has been repeatedly held by the Apex Court that no Government company is obliged to make a contract, but, once it makes a contract, it should be fair and reasonable and it should not be arbitrary. If there is patent illegality or wednesbury arbitrariness, the courts have jurisdiction to interfere in the same in a writ proceedings. In **Tata**

Cellular v. **Union of India** ((1994) 6 SCC 651) it was held by the Apex Court that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. Only if there is patent illegality, irrationality, namely, Wednesbury unreasonableness or procedural impropriety court can interfere in contractual matters. Apex Court further held that the Government must have freedom of contract. In other words, a fair play is a necessary concomitant whether it is functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness, but, must be free from arbitrariness not affected by bias or actuated by malafides. It is settled law that terms of the invitation to tender are not open to judicial scrutiny. Court also cannot whittle down the terms of contract unless the same is wholly arbitrary, discriminatory or actuated by malafides as held by the Apex Court in **Global Energy Ltd. & another** v. **M/s.Adani Exports Ltd. & others** (2005 AIR SCW 2875). Here, admittedly, petitioner is not asking for judicial review of terms of the contract. Petitioner is not attacking any of the terms of the contract. Petitioner is only stating that no amounts are

due to KSIDC. It has not committed breach and breach, if any, is committed by KSIDC. It has already filed a suit for recovering the damages. KSIDC initiated revenue recovery proceedings stating that 'amounts are due'. It is even without an adjudication by the Managing Director of KSIDC. Disputed amounts not settled or adjudicated cannot be recovered by the proceedings under Revenue Recovery Act. Ext.P2 is not a statutory contract. Respondents can realise disputed amount only by adjudication and in the absence of clause for arbitration the only remedy available is to file a suit or file a counter claim in the pending suit. In this case, the Managing Director did not decide the question of damages payable from KSIDC as mentioned under Clause 34 after notice and adjudication. Ext.P12 is a decision from Chief Engineer. Clause 34 cannot be treated as an arbitration clause. When petitioner's claim for damages to the tune of Rs.43 lakhs was rejected under Clause 34, petitioner, treating it as arbitration award, filed petition to set aside the award and KSIDC itself contended that Clause 34 cannot be equated to arbitration and Ext.P11 decision of Managing Director is not amounting to arbitration award. Here, breach of contract is not admitted and petitioner contended that termination of contract by KSIDC is illegal and suit for recovering damages is pending.

6. The maxim ***nemo sibi esse judex vel suis jus dicere debet***, i.e, no man can judge his own cause is accepted by Indian Courts in various decisions. See for example paragraph 17 of the decision in **Bihar State Mineral Development Corporation** v. **Encon Builders (I)(P) Ltd.** ((2003) 7 SCC 418) and the decision in **P.V.Paily** v. **State of Kerala** (AIR 2000 KERALA 268). We also agree with the contention that settled dues to the notified Government company can be realised through revenue recovery proceedings as if it is a Government due and the dues should be an agreed or adjudicated amount. Dues cannot be demanded and recovered by revenue recovery proceedings according to whims and fancies of the parties. In this case, already a claim was made by the petitioner. On its rejection by the Managing Director, the matter is pending in the civil court and claim by the KSIDC is not adjudicated. When the legality of termination itself is a question pending adjudication in a civil court, the Chief Engineer cannot make a demand and threaten the petitioner with revenue recovery proceedings. Now, we will consider the contention of the respondents based upon Clause 34 of Ext.P2 contract that Managing Director of KSIDC, one of the contesting parties, can determine the amount without adjudication by a third party even when breach of contract is not admitted. In this case, Ext.P12 order is not an adjudicated order of the Managing Director as envisaged in

Clause 18 of the Notice inviting tenders for work (supra). Even going by the contractual terms which were relied on by the respondents, there is no power for the Chief Engineer to determine the amount and demand and recover it from the petitioner. Here, so far the Managing Director has not decided the amount as mentioned in the clause relied on by the respondents. Further, clauses 18 and 34 (supra) would show that civil court's jurisdiction, if the amount really and genuinely disputed, is not ousted, but is genuinely contested by the parties.

7. A similar clause like Clause 31 was interpreted by the Apex Court in **State of Karnataka** v. **Rameshwara Rice Mills**, **Thirthahalli** (AIR 1987 SC 1359) wherein it was held as follows:

> "On a plain reading of the words it is clear that the right of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inhered in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a

> subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the Officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract. The position will, however, be different where there is no dispute or there is consensus between the contracting parties regarding the breach of conditions. In such a case the Officer of the State, even though a party to the contract will be well within his rights, in assessing the damages occasioned by the breach in view of the specific terms of clause 12".

A Division Bench of this court earlier, two decades ago, in **K.A.Ponnappan** v. **The D.F.O.Chalakudy and others** (1984 KLJ 853) held that proceedings under the Revenue Recovery Act can be initiated only after determination of the amount even if it is a Government due. The Division Bench held as follows:

> "In case the contract conceives of determination otherwise than through a civil suit such as arbitration, that may be the mode of determination. Normally the civil court will have to determine whether any damages is due and if so what the quantum is. Only on such determination of the amount it could be said to be due and then

> the Revenue Recovery Act can be put into action. Enforcement by resort to the Revenue Recovery Act when there is no amount due is not permissible. Amount would not be due merely because of breach. Breach gives rise to a right to sue. When that right is exercised and as a consequence it is found on adjudication that amount is due, that would be recoverable. This aspect the learned single judge has not considered though it is seen urged before him and it is seen raised under ground No.2. In these circumstances we think the demand under Revenue Recovery Act cannot succeed. The proceedings for recovery will stand quashed."

When breach is not admitted, before determining the amount by suit or arbitration by independent authority, revenue recovery cannot be initiated for recovering disputed damages as settled by this court in various decisions. (See **Abraham Sebastian** v. **State of Kerala** (2002(3) KLT 839) (judgment delivered for Division Bench by Justice B.N.Srikrishna (as he then was), **Mohammed Kunhi** v. **Executive Engineer** (2001(3) KLT 733), **V.P.Kunhammed** v. **State of Kerala** (1999(2) K.L.J. 678) and **K.A.Sobhanadas** v. **State of Kerala & another** (1984 K.L.J 684).

8. In the above circumstances, we set aside Ext.P12 issued by the Chief Engineer without prejudice to the rights of the parties elsewhere. We are not expressing any opinion regarding merits of the claim put forward by the KSIDC. If

the first respondent wants to file a separate suit or counter claim in the suit filed by the petitioner, since there was a stay in this case and was pending for some time, the time taken during the pendency of this proceedings shall be excluded considering the provisions of section 14 of the Limitation Act.

The original petition is allowed to the above extent.

J.B.KOSHY
JUDGE

K.P.BALACHANDRAN
JUDGE

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